

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-1714

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee

—v.—

FRANCISCO ARTIERI,

Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLANT

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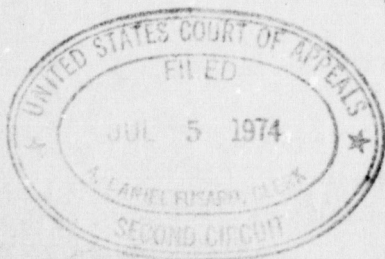


TABLE OF CONTENTS

	PAGE
Statement of the Case	1
Statutes Involved	2
Questions Presented	2
Statement of Facts	3

ARGUMENT:

1. There were erroneous rulings concerning the admissibility of testimony which rulings were prejudicial to the defendant.	3
2. The defendant's conviction was unsupported by the testimony which failed to prove his guilt beyond a reasonable doubt.	4
Conclusion	5

TABLE OF CASES

<i>Brown v. State</i> , 481, P.2d, 475	4
<i>Riggs v. State</i> , 486, P.2d, 643	4
<i>Rodriguez v. United States</i> , 373, F.2d, 17	4
<i>State v. Hunt</i> , 91, Ariz. 149, 370, P.2d, 642	5
<i>United States v. Castanon</i> , 453, F.2d, 952	4
<i>United States v. Cimino</i> , 321, F.2d, 509	4
<i>United States v. Crippen</i> , 459, F.2d, 1387	5
<i>United States v. Johnson</i> , 466, F.2d, 508	4

STATUTES

Title 21, United States Code, Section 841 (a) (1).	1
Title 21, United States Code, Section 846.	1

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 74-1714

UNITED STATES OF AMERICA,

Appellee

—v.—

FRANCISCO ARTIERI,

Appellant

BRIEF FOR THE APPELLANT

Statement of the Case

The defendant Francisco Artieri was indicted on April 13, 1973, by a Federal Grand Jury sitting in Hartford, Connecticut. The three-count Indictment charged the defendant and others with the possession of 169 grams of heroin with the intention to distribute it, in violation of Title 21, United States Code, Section 841(a)-(1); distributing .16 grams of heroin, in violation of Title 21, United States Code, Section 841(a) (1) and conspiring and agreeing to distribute and possess with intent to distribute heroin, in violation of Title 21, United States Code, Section 846. The defendant subsequently entered a plea of not guilty to all three counts.

The case was tried to a Jury of twelve on December 19, and December 20, 1973, and a verdict of guilty was recorded and accepted on all three counts.

On May 10, 1974, the Court sentenced the defendant to the custody of the Attorney General of the United States for a period of three years, to be followed by a special parole term of five years.

The defendant filed a timely Notice of Appeal on May 17, 1974.

Statutes Involved

Title 21, United States Code, Section 841(a) (1).

Section 841. Prohibited acts A — Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

Title 21, United States Code, Section 846.

Section 846. Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine, or both, which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Questions Presented

1. Were certain admissions of testimony as hereinafter described erroneous, and if so were they prejudicial to the defendant?

2. Was the testimony and evidence introduced at the trial sufficient to sustain a verdict of guilty on all three counts beyond a reasonable doubt?

Statement of Facts

On February 22, 1973, Wayne Joseph Drew, a Special Agent with the Drug Enforcement Administration made arrangements to purchase heroin with Ismael Estrada, Efrain Garcia and Eddie Arnott. These arrangements were made in Willimantic, Connecticut (Tr. p. 10).^{*} They met at Lindy's Restaurant in Willimantic, and after some time the defendant walked through the restaurant and into the bar section which was not visible to Agent Drew (Tr. p. 16 and pp. 44-45). During this discussion, Mr. Estrada went to the bar section on several occasions but it was not known to Agent Drew with

^{*} References marked (Tr. p.) refer to the trial transcript.

whom he spoke, nor was he visible at any time (Tr. p. 48). It was agreed that the sale would take place that evening at 7:30 p.m. However, it was subsequently decided that they would meet the next day at the Frontenac Restaurant in Willimantic at 1:00 p.m. (Tr. pp. 19-20).

On the following day at 1:00 p.m., Agent Drew met with Crawford Couch and Efrain Garcia at the Frontenac Restaurant (Tr. p. 20). They decided to meet some time later and at 2:29 p.m., on the same day they again met at the Frontenac Restaurant and at about 3:00 p.m., Ismael Estrada arrived (Tr. pp. 22-23). At all times, Agent Drew and the others were seated at a table in said restaurant.

At about 3:15 p.m., the defendant came in to the Frontenac Restaurant and went to the bar. Subsequently, Ismael Estrada approached the defendant and they talked briefly. At about 3:25 p.m., one Gonzales appeared outside the restaurant and the defendant spoke to him for a brief time (Tr. pp. 25-26).

Some time later, Mr. Estrada entered the men's room of said restaurant and upon the urging of Crawford Couch, Agent Drew also entered the men's room and obtained a package containing heroin from Estrada (Tr. p. 31). Subsequently, after the federal agents entered the restaurant, another package containing heroin was found at the table where Agent Drew, Couch, Garcia and Estrada had been sitting (Tr. p. 34).

ARGUMENT

1.

Rulings concerning admissibility of testimony were erroneous and prejudicial to the defendant.

At no time did Agent Drew testify that he had spoken

with the defendant, nor had he overheard any of the conversations or discussions between the defendant and Estrada or Gonzales. Agent Drew had never observed the defendant committing an illegal act or participating in a conspiracy. Hearsay cannot constitute the sole basis for a finding in a conspiracy charge — it must be substantiated by other facts. *United States v. Castanon*, 453 F. 2d, 952, *United States v. Johnson*, 466 F. 2d, 508. It has also been held that in determining whether a defendant participated in a conspiracy, declarations of alleged co-conspirators made outside his presence would be disregarded. *Rodriguez v. United States*, 373 F.2d, 17, *United States v. Cimino*, 321 F.2d, 509. It was therefore erroneous for the Court to have admitted hearsay testimony of co-conspirators without any independent evidence of defendant's involvement, without laying a foundation for said testimony and without connecting the testimony up to any later acts on the part of the defendant (see Appendix, page 4a). This is especially true where the Court admitted statements of another individual who is not even a co-conspirator as to what the defendant allegedly said (see Appendix, page 5a).

2.

The evidence introduced at the trial was not sufficient to sustain a verdict of guilty on all three counts beyond a reasonable doubt.

As was previously mentioned, Agent Drew did not see the defendant commit any illegal act, nor did he overhear anything said by the defendant to others. A person cannot be said to be in constructive possession of heroin merely because he was in the premises when the police seized the contraband, *Riggs v. State* 486, P. 2d, 643. It cannot be inferred that because of his presence he had knowledge, dominion and control, *Brown v. State*, 481, P. 2d, 475. The fact that an individual is in the company of another who is found to be in possession of heroin is insufficient to establish that he was

in joint possession, *State v. Hunt*, 91, Ariz. 149, 370 P. 2d, 642. Constructive possession may be found only if the defendant clearly had the power to exercise dominion and control over these substances, *United States v. Crippen*, 459, F. 2d, 1387.

The testimony of Agent Drew, standing alone, would not have been sufficient to sustain a guilty finding against the defendant on all of the three counts, nor could it have sustained a guilty finding on any one of the counts. It was only the testimony of Ismael Estrada, a co-conspirator, that could possibly have been the basis for a guilty finding. However, if Estrada's testimony is analyzed, reasonable men could not possibly have believed him beyond a reasonable doubt.

Estrada was in prison for a drug offense unrelated to the present case at the time of his testimony. He denied that concessions were made to him because of his testimony, yet it is very obvious that two counts of the indictment were dismissed against him and he was further released from prison at the time he gave a written statement to Agent Drew. He is admittedly a drug user and gave a written statement some four days ago after he had been imprisoned and isolated from any drugs, although he first denied giving such a statement. Shortly after giving the statement, he was released and obviously, being a drug addict, he would have done anything to be released from prison and be accessible to his drug supply (see Appendix pages, 6a thru 13a.)

CONCLUSION

The appellant, for the reasons submitted, respectfully urges that the verdict and judgment appealed from below be set aside.

Respectfully submitted,

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